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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 1069

No. 174

ALBERT R. COSGROVE,
Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois.

RECORD OF CIRCUIT, APPELLATE AND SUPREME COURTS OF ILLINOIS.

ZENO MIDDLETON,
1718 State Street,
East St. Louis, Illinois,
Attorney for Petitioner.

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56-M-14.

IN THE

Appellate Court of Illinois,

FOURTH DISTRICT.

MAY TERM, A. D. 1956.

ALBERT R. COSGROVE,
Plaintiff-Appellant,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Defendant-Appellee.

Appeal from the Circuit Court of Madison County, Illinois.

The Honorable Quinten Spivey, Judge Presiding.

ABSTRACT OF RECORD.

Record Page

1 Convening Order.

2–4 Complaint.

6–8 Summons and return.

12 Defendant's Motion to Dismiss Complaint or in the alternative to make more definite and certain.

13 Docket order of September 24, 1953, granting plaintiff leave to file amended complaint and same filed; defendant ruled upon to answer in 20 days.

15–22 **AMENDED COMPLAINT.**

Albert R. Cosgrove, plaintiff, with leave of Court first had and obtained, amends his complaint and alleges:

1. That the plaintiff is a resident of St. Clair County, Illinois; that the defendant, The New York, Chicago and St. Louis Railroad Company, is a railroad corporation operating as a common carrier in interstate commerce within the meaning of Section 151, Title 45, U. S. Code (being the Railway Labor Act of 1926), as amended; and that the defendant is incorporated under and by virtue of the laws of the State of Illinois as well as under the laws of other states and is thereby a multi-state corporation.

2. That in the year 1923 at Madison County, Illinois, plaintiff entered into a contract of employment with the defendant as a machinist's helper, at which position he was employed until March, 1929.

3. That on March 8, 1929, at Madison County, Illinois, plaintiff entered into another contract of employment with the defendant, wherein plaintiff agreed to work for defendant as a car inspector and defendant

agreed to employ plaintiff according to the rates of pay and regulations of what is known as the "Carmen's Agreement."

4. At the time of the occurrence of the matter herein complained of there was in full force and effect a contract existing between defendant and the plaintiff (executed by his bargaining agent, Brotherhood of Railway Carmen of America), the parts of which pertinent hereto provided as follows:

> Rule 14. In reduction of forces or when new jobs are created or vacancies occur in the respective crafts, the oldest employee in point of service shall, if sufficient ability is shown by trial, be given preference in filling such new jobs or any vacancies that may be desirable to them. All vacancies or new jobs created will be bulletined. Bulletins must be posted five days before vacancies are filled permanently. Employees desiring to avail themselves of this rule will make written application to the official in charge, and a copy of the application will be given to the Local Chairman.
>
> An employee exercising his seniority rights under this rule will do so without expense to the carrier; he will lose his right to the job he left; and if after a fair trial he fails to qualify for the new position, he will have to take whatever position may be open in his craft.
>
> Temporary vacancy of 30 days or more will be bulletined. Employees filling such temporary vacancies will be returned to their former positions at the expiration of the temporary position.

Rule 22. When it becomes necessary to reduce expenses at any point or in any department or subdivision thereof, the hours or forces may be reduced by mutual agreement. Seniority as per Rule 26 to govern. The men affected to take the rate of the job to which they are assigned in accordance with the provisions of Rule 14. In reducing forces the ratio of apprentices will be maintained.

Three working days' notice will be given men affected before reduction is made and lists be given local committee.

In the reduction of forces employees who so desire may have their seniority rights in favor of a junior employee, seniority to govern, at that point. Such waiver shall be in writing, and a copy furnished the local committee.

In the restoration of forces senior laid off men, including those who have waived their rights as per the preceding paragraph, will be given preference in returning to service, if available within seven (7) days. Local committee will be furnished list of men to be restored to service.

Rule 24. When reducing forces, if men are needed at any other point they will be given preference to transfer with privilege of returning to home station when force is increased, such transfer to be made without expense to the Company. Seniority and ability to govern in all cases.

Rule 26. Seniority of employees in each craft covered by this agreement shall be confined to the

point employed in the Maintenance of Equipment Department.

Four sub-divisions of the Carmen as follows:

Pattern Makers.
Upholsterers.
Painters.
Other Carmen.

The Seniority lists will be open to inspection and copy furnished the committee.

In the event that work is moved from any point, the employees affected at the point the work is moved from will have the privilege of exercising their seniority rights at the point employed to any job that may be preferable to them in their craft according to their seniority.

Men promoted to Supervisory capacity (both monthly and hourly rated positions), will hold and accumulate seniority in their respective crafts at the point last employed as craftsmen and may exercise such seniority if displaced either account of position being abolished or for no reasons of his own; if such positions be vacated for reasons of his own, he will then take the position of junior employee of his craft and after which he can exercise his seniority to fill any vacancy or new position.

Rule 29. Should an employee be assigned temporarily to fill the place of a foreman, he will be paid his own rate, straight-time for straight-time hours and overtime for overtime hours, if greater than the foreman's rate. If it is not, he will get the foreman's rate. In filling such posi-

tions, preference shall be given to mechanics in the respective crafts.

Rule 30. (Effective October 1, 1943.)

Should any employee subject to this agreement believe he has been unjustly dealt with, or any of the provisions of this agreement have been violated, he shall have the right to take the matter up with his foreman in person or through the duly authorized local committee within 10 days. If unable to arrive at a satisfactory settlement with the foreman, the case may be taken to the highest local officials in the regular order preferably in writing. If stenographic report of investigation is taken the committee shall be furnished a copy. If the result still be unsatisfactory, the employee, or the duly authorized general committee, shall have the right of appeal, preferably in writing, with the highest officials designated to handle such matters, in their respective order, and conference will be granted within ten days of application.

Should the highest designated railroad official, or his duly authorized representative, and the duly authorized representative of the employees fail to agree, the case may then be handled in accordance with the Railway Labor Act.

All conferences between the local officials and local committees to be held during regular working hours without loss of time to committeemen. Prior to assertion of grievances as herein provided, and while questions are pending there will neither be a shutdown by the employer nor a suspension of work by the employee.

Rule 31. An employee shall not be discharged for any cause without first being given an investigation.

If it is found that an employee has been unjustly discharged or dealt with, such employee shall be reinstated, and shall be compensated for the wage loss, if any, suffered by him, the compensation earned by him in outside employment in the meantime shall be taken into consideration in determining the wage loss.

Rule 33. Helper apprentices shall retain their seniority as Helper until they have completed the first year of their apprenticeship.

Rule 42. Craftsmen and apprentices will be furnished sufficient competent help, when needed to handle the work, if available. When experienced Helpers are available, they will be employed in preference to inexperienced men. On work which requires a Helper continuously, a regular Helper will be assigned as far as practicable.

Laborers when used as Helpers one hour or more will be paid the Helper's rate while so employed.

Rule 48. Helpers shall not be advanced to the detriment of mechanics or apprentices, except as provided for in the apprentice rules where the advancement of Helpers to apprenticeship in the respective trades is contemplated in this agreement.

Rule 49.

Effective December 27, 1943, the minimum rates of pay will be as follows:

Class of Employees	Minimum Rate Per Hour
Machinists	$1.04
Boilermakers	1.04
Blacksmiths	1.04
Sheet Metal Workers	1.04
Electrical Workers covered by Rule 106	1.04
Electrical Workers covered by Rule 107	1.00
Carmen (Passenger Car Work, including Upholsterers, Pattern Makers, Cabinet Makers and Locomotive and Passenger Car Painters)	1.04
Carmen (Freight Car Work, including Freight Car Painters and Locomotive Tender Truckmen)	.97
Car Inspectors (Freight and Passenger)	.97
Wrecking Derrick Engineers and Locomotive Crane Operators	.97
Helpers—All Crafts:	
1st year minimum 290 days	.78
Over one year	.81
Coach cleaners and preparers	.66

Effective as of October 1, 1943, employees will be allowed one cent for each hour actually worked, for checking in and out and making out service cards. The practice of employees checking in and out on their own time will be continued.

Carmens' Special Rules.

Rule 115. Any man who has served an apprenticeship or who has had four (4) years' practical experience at carmen's work, and who with the aid of tools, with or without drawings, can lay out, build or perform the work of his craft or occupation in a mechanical manner, shall constitute a Carman.

Rule 116. Carmen's work shall consist of * * *; inspection work and repairs in connection with air brake equipment on freight cars; * * * joint car inspectors, car inspectors, safety appliance and train car repairs; * * * and all other work generally recognized as carmen's work.

Rule 118. Car Inspectors including joint car inspectors, where Yard Masters or Clerks are not employed, may when necessary to expedite transportation, take seal records, commodity records and destination of cars.

Carmen Helpers' Special Rules.

Rule 121. Carmen Helpers' work shall consist of any work he is instructed to perform under the direction of the mechanics or apprentices he is working with, employees engaged in washing and scrubbing the inside and outside of passenger coaches preparatory to painting; removing of paint on other than passenger cars preparatory to painting, car oilers and packers; stock keepers (car department), operators of bolt threaders, nut tappers, drill presses and punch and shear operators (cutting only bar stock and scrap), holding

on rivets, striking chisel bars, side sets, and backing out punches; using backing hammer and sledges in assisting carmen in straightening metal parts of cars; rebrassing of cars in connection with oilers' duties, cleaning journals; repairing steam and air hose; assisting carmen in erecting scaffolds, grinding angle cocks, sand blasting, making grain and coal doors, assisting in dismantling cars for repairs, and all other work generally recognized as carmen helpers' work, shall be classed as Helpers.

Rule 134. Fifty per cent of the apprentices may be selected from carmen's helpers who have had not less than two consecutive years' experience at the point employed at the time application for apprenticeship is made, except that when the necessary number of regular apprentices cannot be obtained, the quota may be filled by helper apprentices, this to be handled in conjunction with the Shop Committee. Helper apprentices shall not be over 30 years of age.

and, that at the time he was employed as an inspector he was informed that the "Carmen's Agreement" was his contract of employment with defendant.

5. Plaintiff worked for defendant performing car inspector's work from and after March 8, 1929, at Madison County, Illinois, on and off throughout the great depression, and on September 15, 1943, he was made a car inspector leader.

6. Defendant issued and delivered to the plaintiff:

(1) An identification Card No. 14, authorizing him as a Car Inspector to operate a motor car dated Jan-

uary 17, 1930, until January 1, 1931, a copy of which is attached hereto and made a part hereof and marked Plaintiff's Exhibit No. 1.

(2) An employee's identification card, showing his name and occupation and assigning him identification No. 9883, with instructions thereon that said identification number should be shown on all time and service reports, deductions, orders, etc., a copy of which is attached hereto and made a part hereof and marked Plaintiff's Exhibit No. 2.

(3) An identification card No. 4501, issued January 20, 1943, giving his physical description and right thumb print for identification purposes during World War II, a copy of which is attached hereto and made a part hereof and marked Plaintiff's Exhibit No. 3.

(4) A system pass No. S-941, good for the year 1945-1946 until December 31, 1946, a copy of which is attached hereto and made a part hereof and marked Plaintiff's Exhibit No. 4.

(5) A system pass No. S-4738, good for the year 1947-1948, until December 31, 1948, a copy of which is attached hereto and made a part hereof and marked Plaintiff's Exhibit No. 5.

7. Plaintiff, until the date of his discharge, performed his duties and complied with all the provisions and regulations of the defendant.

8. Plaintiff complied with the Carmen's Agreement in requesting an investigation and hearing and has repeated said request through regular channels up to and including the Chief Operating Officer of defendant, but the defendant has failed, refused and neg-

lected to make an investigation, conduct a hearing, present witnesses against the plaintiff or allow plaintiff to be heard and present his witnesses or evidence in his behalf, or to have a transcript of hearing and testimony.

9. Plaintiff's relationship as a car inspector was severed by defendant on June 13, 1949, without formal charge or hearing, and he was never since allowed by defendant to work at his employment since said time.

10. That on the 13th of June, 1949, at approximately 2:30 o'clock in the afternoon, or thirty minutes before he was due to go to work on his job in the Madison Yards of the defendant, that his foreman, Mr. H. C. Summers, stated to the plaintiff that he had been talking with Mr. Rudy Killian, District Car Foreman, whose office was at Frankfort, Indiana, and that Mr. Killian had given instructions that the plaintiff was to be sent home unless he signed a statement signing away his rights as a carman and consenting to be placed on the seniority roster at said Yards of the defendant as a car repair helper.

11. Plaintiff's discharge was not the result of any act of his, but rather from the violation of the contract of employment by defendant and that as a result thereof plaintiff has been damaged in the following particulars:

(a) Loss of seniority rights.

(b) Loss of his means of livelihood.

(c) Loss of Pension rights.

(d) Loss of Insurance benefits.

(e) Loss of disability benefits.

(f) Loss of vacation rights.

(g) Loss of hospital rights.

(h) Loss of pass rights.

12. Plaintiff was born March 1, 1898, and is now 55 years of age and that the foregoing rights were earned as the results of over 24 years of car inspecting service to the defendant, and that he is now at the age where he is, because of his age, unable to obtain work as a car inspector, and because thereof he is unable to ever accumulate such emoluments as he had acquired with the defendant, all to his damage in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars.

Wherefore, plaintiff prays judgment against the defendant in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, together with costs.

Albert R. Cosgrove, Plaintiff,

By Zeno Middleton,
His Attorney,
1360a State Street,
East St. Louis, Illinois,
Upton 5-2550.

Plaintiff Demands Jury Trial and Requests Summons Be Issued.

22 Exhibits 1, 2, 3, 4 and 5.

ANSWER TO AMENDED COMPLAINT.

25-26 Comes Now The New York, Chicago and St. Louis Railroad Company, a corporation, defendant in the above captioned cause, by its attorneys, Pope and Driemeyer, and for answer to plaintiff's amended complaint states:

1. Defendant admits the allegations of paragraph 1 of said complaint.

2. Defendant denies the allegations of paragraph 2 of said complaint.

3. Defendant denies the allegations of paragraph 3 of said complaint.

4. Defendant admits the existence of a certain contract between it and the Brotherhood of Railway Carmen of America, as set forth in paragraph 4 of plaintiff's complaint, but denies all of the other allegations therein contained.

5. Defendant denies the allegations of paragraph 5 of said complaint.

6. Defendant denies the allegations of paragraph 6 of said complaint, and denies the allegations of subparagraphs (1), (2), (3), (4) and (5) thereunder.

7. Defendant denies the allegations of paragraph 7 of said complaint.

8. Defendant denies the allegations of paragraph 8 of said complaint.

9. Defendant denies the allegations of paragraph 9 of said complaint.

10. Defendant denies the allegations of paragraph 10 of said complaint.

11. Defendant denies the allegations of paragraph 11 of said complaint.

12. Defendant denies the allegations of paragraph 12 of said complaint.

Pope and Driemeyer,

By /s/ Frank M. Rain,

Frank M. Rain,

Attorneys for Defendant.

Pope and Driemeyer,
322 First National Bank Building,
East St. Louis, Illinois.

29 Defendant's Motion for leave to withdraw Answer to Amended Complaint.

37-38 **MOTION TO DISMISS FOR LACK OF JURISDICTION.**

Comes Now The New York, Chicago and St. Louis Railroad Company, a corporation, defendant in the above captioned cause, by its attorneys, Pope and Driemeyer, and moves the Court to dismiss this cause, for the reason that the Court has no jurisdiction of the subject matter set forth in plaintiff's complaint.

In support of its motion, defendant states:

1. Plaintiff's complaint shows on its face that plaintiff failed, neglected or refused to exhaust administrative remedies available to him prior to commencing this action.

2. Plaintiff failed to avail himself of the administrative remedies set out in Rule 30 of the contract pleaded in his complaint, in that:

(a) He suspended work and walked off the job on the 13th day of June, 1949.

(b) He made no effort to follow the procedures set forth in Rule 30, but he did progress his alleged grievance directly to the National Railroad Adjustment Board.

(c) Plaintiff, even though advised by the National Railroad Adjustment Board, by letter dated June 12, 1950, that his ex parte submission "does not disclose that the subject matter has been handled in the 'usual manner' and failed of adjustment in said manner, as required by Section 3 (1) of the Railway Labor Act and our Rules (Circular No. 1);" nevertheless, failed, neglected or refused to process or progress his alleged grievance as required by the contract herein pleaded and the Rules of the National Railway Adjustment Board. A copy of the aforesaid letter, marked Defendant's Exhibit "A", is attached hereto and made a part hereof.

(d) Plaintiff was neither discharged nor disciplined, therefore he was obliged to process his grievance strictly in accordance with the provisions of Rule 30 of the contract set forth in his complaint.

Wherefore, defendant prays that this cause be dismissed, and that it go hence without day and recover its costs herein expended.

Pope and Driemeyer,
By Frank M. Rain.

(Verification.)

39 **PLAINTIFF'S EXHIBIT "A"**

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION
Twenty-First Floor, Consumers Bldg.
220 South State Street, Chicago 4, Illinois

June 12, 1950.

Mr. A. R. Cosgrove,
510 N. 38th Street,
East St. Louis, Illinois.

Dear Sir:

This has reference to your ex parte petition dated October 15, 1949.

I am directed to advise you that the Division finds that since the ex parte submission does not disclose that the subject matter has been handled in the "usual manner" and failed of adjustment in said manner, as required by Section 3 (1) of the Railway Labor Act and our Rules (Circular No. 1), it appears that the Board is without jurisdiction.

There is in effect an agreement between the New York, Chicago and St. Louis Railroad Company and System Federation No. 57, A. F. of L., in which rules are set forth defining the usual manner for progressing grievances. There is nothing in the ex parte submission submitted by you to indicate that the alleged grievance has been handled and appealed in the manner set forth in the agreement.

Very truly yours,
National Railroad Adjustment Board,
By Order of Second Division,
S/ J. L. Mindling, Secretary.

cc: Mr. T. C. Shortt.

39-42 Plaintiff's Motion to Strike.

43-44 Plaintiff's Motion to inspect, copy, impound and preserve evidence.

46 Docket Entry of December 7, 1954, showing Motion to Dismiss was submitted on memorandum and taken under advisement.

47-56 Convening and continuation orders.

57 Docket Entry of December 21, 1955, dismissing Complaint with prejudice to plaintiff on Motion of defendant as per written order on file.

58 **JUDGMENT.**

This matter came on to be heard on defendant's verified "Motion to Dismiss for Lack of Jurisdiction," and Exhibit "A" thereto attached, on the 7th day of December, 1954, same having been submitted on defendant's memorandum brief, plaintiff's answer thereto dated December 8, 1954, and defendant's reply dated December 9, 1954.

The Court now having examined the briefs of the parties, the pleadings herein filed, and all matters pertinent thereto, finds that it has no jurisdiction of the subject matter set forth in plaintiff's amended complaint, and that said complaint should be dismissed.

Wherefore, It Is Ordered, Adjudged and Decreed that defendant's motion to dismiss plaintiff's amended complaint for lack of jurisdiction of the subject matter be and the same hereby is sustained and allowed, and said suit be and the same hereby is dismissed with

prejudice. Judgment is therefore entered in favor of defendant and against plaintiff, in bar of his action, and defendant shall go hence without day and recover his costs herein expended.

/s/ Quinten Spivey,
Quinten Spivey,
Circuit Judge.

Filed Dec. 21, 1955.

62 Docket Entry that Notice of Appeal was filed January 11, 1956.

64-65 Notice of Appeal and Proof of Service.

66 Docket Entry that Praecipe for Record was filed January 14, 1956.

68 Praecipe for Record and Proof of Service.

70 Order entered February 29, 1956, extending time for filing record on appeal 30 days.

71 Approval of Record by Opposing Counsel.

Approval of Record by Presiding Judge.

Certificate of Clerk of Circuit Court of Madison County, Illinois, and file mark of said Clerk showing the record was filed in said Court on March 28, 1956.

ZENO MIDDLETON,
1360a State Street,
East St. Louis, Illinois,
Attorney for Plaintiff-Appellant.

IN THE

Supreme Court of Illinois.

MARCH TERM, 1957.

ALBERT R. COSGROVE,
Plaintiff-Appellant,
vs.
THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Defendant-Appellee.

Petition for Leave to Appeal to the Supreme Court From the Appellate Court for the Fourth District.

Hon. Quinten Spivey, Judge Presiding.

ABSTRACT OF RECORD OF APPELLATE COURT.

Record Page

1 Placita.

3 April 5, 1956. Record on Appeal filed in Appellate Court with the Appellee's counsels' approval thereon.

5 April 10, 1956. Notice of filing record on appeal with proof of service filed.

7 April 30, 1956. Appellee's motion to dismiss appeal filed.

11 May 1, 1956. Objections of plaintiff to the motion to dismiss the appeal filed.

14 May 3, 1956. Nine copies of plaintiff's brief and the abstract of the record filed, with proof of service.

16 May 8, 1956. Appellee's motion to dismiss the appeal denied.

18 May 25, 1956. Appellee's brief filed in Appellate Court.

20 June 1, 1956. Nine copies of plaintiff's reply brief filed with proof of service.

23 June 5, 1956. Record of plaintiff furnishing Appellate Court with decision rendered by United States Supreme Court on May 21, 1956.

25 Oct. 23, 1956. Case taken under advisement after hearing oral arguments.

27 Nov. 5, 1956. Opinion of the Appellate Court filed.

28 Opinion of the Appellate Court.

32 Nov. 28, 1956. Plaintiff's motion for certificate that there is fairly involved in plaintiff's claim more than $1,500.00.

34 Dec. 3, 1956. Certificate that more than $1,500.00 is involved in plaintiff's claim, issued and filed.

36 Dec. 29, 1956. Praecipe for Appellate Court record filed.

37 Certificate of the Clerk of the Appellate Court that the foregoing is a true, perfect and complete transcript of the record in the Appellate Court, signed, dated and sealed with the Seal of the Appellate Court.

ZENO MIDDLETON,
Attorney for Petitioner, Albert R. Cosgrove, Plaintiff-Appellant.

IN THE

Supreme Court of Illinois.

MARCH TERM, 1957.

ALBERT R. COSGROVE, Plaintiff-Appellant, vs. THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation, Defendant-Appellee.	Petition for Leave to Appeal to the Supreme Court From the Appellate Court for the Fourth District.

Hon. Quinten Spivey, Judge Presiding.

APPELLANT'S PETITION FOR LEAVE TO APPEAL.

OPINION.

In the
Appellate Court of Illinois,
Fourth District,
Oct. Term, 1956.

Appeal From the Circuit Court of Madison County, Illinois, Per Curiam.

The defendant here filed a motion to dismiss this appeal for failure of appellant to comply with the

rules of court. Prior to filing the briefs this motion was presented to a judge of this court in vacation who relied upon the representations of appellant's counsel set forth in his objections, and thereupon denied the motion.

Upon final hearing in this court, the actual procedure that was followed has been shown to this court from the official records. It is shown therein that the trial court dismissed the complaint on motion and entered final judgment for defendant on December 21, 1955. Plaintiffs filed notice of appeal therefrom on January 11, 1956.

The plaintiffs had until March 12, 1956, to file the record on appeal in this court by reason of the 60 day rule. App. Ct. Rule 1 (2) (d); Sup. Ct. Rule 36. Section (e) of this rule further provides for granting additional time by the reviewing court or a judge thereof during vacation. No authority is conferred upon the trial court or judge thereof to extend the time for filing the record on appeal in any reviewing court. There is a provision granting to the trial judge authority to extend the time for filing a report of proceedings not more than 45 days. If such an extension is granted, the rule further provides (Par. d) that the time for filing the record on appeal is automatically extended 10 days beyond the extended time for filing the report of proceedings.

Appellant's objection to the dismissal of this appeal represented that a trial judge had granted 30 days' extension of time to file the report of proceedings and that a report of proceedings had been filed within the extended period. These representations were the basis for the vacation order denying the motion to dismiss the appeal.

Apparently appellant's counsel misunderstood the provisions of the rule, for this court now finds that the praecipe for record filed by appellant did not call for the inclusion of a report of proceedings, since the case was dismissed on motion attacking the complaint, without hearing on evidence.

We further find that no order has been entered by a trial judge for extension of time to file a report of proceedings, and no such report has ever been filed. The record does disclose an order entered in the circuit court on February 29, 1956, purporting to grant 30 days' extension of time to file the record on appeal in this court. As previously noted, the trial court has no authority to grant such an extension, and the order is void. McDonald v. McDonald, 351 Ill. App. 432.

The record on appeal was filed in this court on April 5, 1956, although the time to file it had expired March 12, 1956. It was filed too late and the appeal must be dismissed. Supreme Court Rule 36 (2) (g) provides: "The reviewing court shall dismiss the appeal if the record on appeal is not filed in proper time." To similar effect is App. Ct. Rule 1 (2) (g).

It is therefore ordered that the order in vacation denying the motion to dismiss this appeal is set aside, as having been entered upon mistake of fact, and this appeal is dismissed.

Appeal Dismissed.

Publish in full.

Filed Nov. 5, 1956,
David F. Mallett,
Clerk of the Appellate Court,
Fourth District of Illinois.

PETITION FOR LEAVE TO APPEAL.

Albert R. Cosgrove, plaintiff-appellant in this cause in the Appellate Court for the Fourth District, respectfully presents this, his Petition for Leave to Appeal from a final judgment of said Appellate Court to the Supreme Court of Illinois. Your petitioner respectfully submits that a fact essential to a proper presentation of this case requires a correction of the following among the facts stated in the opinion of the Appellate Court.

There was no transcript of testimony filed because there was no testimony taken. The complaint was dismissed by the trial judge on defendant's motion, and that within itself was the proceedings the report of which was filed. The legal proceedings consisted of oral arguments on the motion and extensive briefing in which the motion was reargued by both sides, the trial court had the motion under advisement a long time, and the final proceeding in the trial court was the entry of the order dismissing plaintiff's complaint.

POINTS AND AUTHORITIES.

1-a.

Ill. Sup. Ct. Rule 36.1 (e) defines what the report of proceedings shall consist of, and the term "report of proceedings" is not synonymous with "the testimony," as report of the proceedings embraces the testimony where there is any, but where there are legal proceedings consisting of rulings of the trial judge and all other matters upon which rulings were made in the absence of testimony, there can still be a report of the proceedings. This same definition is found in the Appellate Court Rule 1 (e), where the same distinction is made.

1-b.

"Report of proceedings," however, is synonymous with "Record on Appeal." Ill. Sup. Ct. Rule 36 "(1) Praecipe for Record: Report of Proceedings at the trial." Same title in App. Ct. Rule 1 (1).

1-c.

The trial judge has the right to grant an extension of time for filing the report of proceedings [Sup. Ct. Rule 36 (2). (c) and App. Ct. Rule 1 (2) (d)], and those courts meant "Record on appeal," otherwise why did they employ the term "further" with regard to "record on appeal" in the next following sentence in each rule.

2-a.

In this case it may no longer be necessary to pass on whether a discharged railroad employee must first

exhaust his administrative remedies (before the Railway Labor Board) under Illinois law before bringing suit for damages for breach of contract for wrongful discharge. Under Federal law such is not the rule, and the decision of Transcontinental & Western Air, Inc., v. Koppal, 345 U. S. 653, 97 L. Ed. 1325, 73 S. Ct. 906, has been completely emasculated by the case of Railway Employees' Department, American Federation of Labor, et al., v. Robert L. Hanson, 76 Sup. Ct. Rep. 714, No. 451; decided May 21st, 1956.

Moore v. Ill. Cent. R. R. Co., 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754;

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577.

2-b.

The Illinois Appellate Court for the Fourth District is bound by its own decision in Keel v. Ill. Term. R. Co., 346 Ill. App. 169, 104 N. E. 2d 659.

2-c.

In Illinois it is not required that administrative remedies be exhausted before bringing an action for breach of contract.

Toledo, P. & W. R. R. Co. v. Brown, 375 Ill. 438, 31 N. E. 2d 767;

Buster v. Chicago, M. St. P. & P. R. Co., 195 Fed. 2d 73;

U. S. ex rel. DeLucia v. O'Donovan, 178 Fed. 2d 876, certiorari denied 340 U. S. 886;

Lyons v. Greyhound Lines, 192 Fed. 2d 533.

3.

To deny plaintiff access to our courts is a denial of his State and Federal Constitutional Rights.

U. S. Constitution, 14th Amendment and 10th Amendment;

Illinois Constitution, Art. II, Sections 5, 14 and 19, and Art. III.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. .....

ALBERT R. COSGROVE,
Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois.

RECORD IN THE SUPREME COURT OF ILLINOIS.

Record Page.

1 Placita and convening order.

2 December 29, 1956. Petition for leave to appeal filed.

4 December 29, 1956. Record of Circuit and Appellate Courts filed.

5 Memorial of filing of transcript of record.

6 March 18, 1957. Order denying petition for leave to appeal.

7 Certificate of the clerk of the Supreme Court of Illinois.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. ~~1069~~ 174

ALBERT R. COSGROVE,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

ZENO MIDDLETON,
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Constitutions Cited.

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IN THE

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THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision of the Supreme Court of Illinois entered on March 18, 1957, denying leave to appeal from the decision rendered by the Appellate Court of Illinois for the Fourth District upon November 5, 1956.

OPINION BELOW.

The opinion of the court below entered on November 5, 1956, in the Appellate Court of Illinois, from which, the Supreme Court of Illinois denied leave to appeal, found in 11 Ill. App. 2d 574 and 138 N. E. 2d 112 and is printed in an appendix to this petition, for the convenience of this Court.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 1257 (3) of Title 28, United States Code.

The opinion of the Appellate Court of Illinois was filed November 5, 1956; petition for leave to appeal to the Supreme Court of Illinois was denied March 18, 1957.

Petitioner claims a right under a Statute of the United States to bring his suit for damages against the Respondent in a Court of Law, where he has elected to treat his discharge as an employee final. The Statute being Sec. 151 et seq. of Title 45 of the United States Code as construed and interpreted in the cases of Moore v. Ill. Cent. R. R. Co., 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 557.

QUESTIONS PRESENTED.

The questions presented here for determination are important but may be stated very briefly. They are as follows:

1. Where a railroad employee has been discharged in violation of the contract of employment (entered into under and in compliance with the National Railway Labor

Act), does the rule laid down in Transcontinental & Western Air, Inc., v. Koppal, 345 U. S. 653, 97 L. Ed. 1325, 73 S. Ct. 906, still prevail? i. e., does he have to exhaust his administrative remedy if such is a condition precedent under State Law? Has that decision been modified by the later decision in Railway Employees Department, American Federation of Labor et al. v. Robert L. Hanson, holding that as to Railway Labor Contracts State Law has been superseded by Federal Law, or has it?

2. Where the State Court has in previous cases held that the discharged employee may bring his suit for damages in a Court of Law where he accepts and treats his discharge as final (Keel v. Ill. Term. R. Co., 346 Ill. App. 169, 104 N. E. 2d 659) under a Federal Statute (Title 45, U. S. Code, Sec. 151, et seq.) may that Court employ "merry-go-round" tactics to duck deciding the issue in violation of the United States Constitution, the 7th, 10th and 14th Amendments, and in violation of the Illinois Constitution, Article III and Article II, Sections 2, 5 and 19, and the United States Constitution, Article I, Section 10, and Illinois Constitution, Article II, Section 14.

3. Where it has been pleaded and put into issue as a submissible question to a jury, of mixed law and fact that the discharged employee who has a right under a Federal Statute (Title 45, U. S. Code, Sec. 151, et seq.) alleging that he exhausted his contractual remedies and thereafter exhausted his administrative remedies may such an issue based upon a Federal right be defeated or withdrawn from the jury upon an attack by a motion that has the effect of denying the discharged employee his day in Court in violation of the United States Constitution, the 7th, 10th and 14th Amendments and in violation of the Illinois Constitution, Article III and Article II, Sections 2, 5 and 19 and the United States Constitution, Article I, Section 10, and Illinois Constitution, Article II, Section 14.

In answering these questions petitioner assigns as error the action of the trial judge in sustaining defendant's motion to dismiss, the action of Appellate Court in Illinois in extending time to file the record and then withdrawing the extension and the action of the Supreme Court of Illinois in refusing leave to appeal, all of which had the effect of denying plaintiff his day in Court.

CONSTITUTIONAL PROVISIONS.

The constitutional provisions involved are several in number and our text is set forth in the appendix hereto. They are the following:

United States Constitution, Amendment XIV;
United States Constitution, Amendment X;
United States Constitution, Amendment VII;
Illinois Constitution, Article III;
Illinois Constitution, Article II, Sections 2, 5 and 19;
United States Constitution, Article I, Section 10;
Illinois Constitution, Article II, Section 14.

STATEMENT OF THE CASE.

References in parenthesis are to the page numbers in the printed record supplied by petitioner.

Forty copies of the printed record that have been furnished with this petition present all things deemed necessary for a consideration of the questions presented as set forth in this petition. The record as printed for the use of the last court below with the addition thereto of the proceedings in that court is furnished in compliance with Rule 26 (1). The decision of the Circuit Court is printed at page 18 and the decision of the Railway Adjustment Board is printed at page 17 of the record.

The instant case is the third action by this petitioner. The instant case was started in the Circuit Court of Madi-

son County, a part of the third judicial circuit of Illinois. The first was before the Railroad Adjustment Board and the second was before the U. S. District Court for the Eastern District of Illinois.

There are two federal questions involved. One concerns a right of action under federal statute and the other the right of hearing under the federal constitution. Both were raised in the Circuit Court of Illinois.

Plaintiff was born March 1, 1898. In 1923 he entered the employment of defendant at Madison, Illinois, as a machinist helper, at which he was employed until March 8, 1929. On that date he entered into another contract of employment with defendant wherein he agreed to work as a car inspector. There was an agreement between defendant and the union craft to which plaintiff belonged. That union, Brotherhood of Railway Carmen of America, had entered into a contract which was in force at the time of plaintiff's wrongful discharge. The contract like most others of the same general type provided for: Seniority, grievance procedures, the right to a stenographic report of hearings, appeals procedures, promotion from helper to mechanic status, rates of pay, definition of a car inspector, etc.

To the complaint filed by plaintiff he attached several photo-copies of passes issued to him by defendant on an annual basis (p. 11).

In the year 1940 when railroad business began increasing due to the war in Europe, defendant began hiring more employees. The local foreman of mechanics at Madison, Illinois, began hiring relatives and friends from his childhood hometown of Murphysboro, Illinois. Realizing these would not be able to hold a regular position in normal times, that foreman began looking for ways to force the eldest employees into retirement and to force other em-

ployees into outside positions. Thus the foreman hoped to create jobs which his friends and relatives could retain when things returned again to normal. One of those the foreman took after was plaintiff. In August, 1941, the foreman began to bring coercion and duress upon plaintiff to sign a statement which would fix plaintiff's status as that of a car inspector helper as of August, 1941.

The coercion and duress increased in its intensity until it amounted to hostility, humiliation and embarrassment. Finally on June 11, 1949, the foreman told plaintiff in the presence of witnesses that it was either sign his mechanic status and seniority away and take that of a helper or he would take him out of service and the following day would be his last.

Plaintiff worked on June 12th but when he reported for work June 13th, 1949, the foreman of defendant had another man called out and who came to work the plaintiff's job. Plaintiff was given the ultimate of signing his status away and becoming a helper or go home. Plaintiff refused to sign and the foreman of defendant refused to let him work on his regular position. There was nothing for plaintiff to do but go home, as he was then and there taken out of service by defendant.

Plaintiff followed up the grievance procedure in the contract of his craft and the appeal procedure therein to the very highest Chief Operating Officer of defendant. (p. 11). To him everyone had a deaf ear. His union is weak and dilatory and omitted to respond to many requests to arbitrate his case or prosecute it to the Railroad Adjustment Board.

Plaintiff filed a complaint and request for arbitration with the Railroad Adjustment Board seeking reinstatement. The defendant filed a motion claiming that plaintiff had not exhausted his administrative (sic-contractual)

remedies which he was right then attempting to do. It being well known to This Honorable Court that the Railroad Adjustment Board has never looked with favor upon the individual employee prosecuting his case before that body without it being brought there and prosecuted by one of the craft unions, gave plaintiff the brush off. There was no evidence taken in support of or in opposition to that motion, and it was sustained without hearing argument (p. 17).

Plaintiff then went into U. S. District Court for the Eastern District of Illinois. Plaintiff's attorney at that time mistook jurisdiction of that court. Plaintiff brought his case under the diversity theory and it turned out that defendant was a multi-state corporation, one of the states of its incorporation being Illinois and plaintiff being a citizen of Illinois. The most fatal defect, however, was in the relief sought,—plaintiff was still seeking reinstatement. Of course, the District Judge had to dismiss.

Plaintiff then sought out his present counsel who filed the instant suit in the third judicial circuit of Illinois, of which the Circuit Court of Madison County is a part. The defendant wanted more detail and moved to dismiss the complaint or to make it more definite and certain. Leave was granted to file an amended complaint (p. 2). In this suit by both the original complaint and the amended complaint plaintiff seeks damages for wrongful discharge. He spells out how he was damaged.

Plaintiff in his suit here accepts his discharge as final.

In the Court of first instance no evidence was heard. Defendant filed a motion to dismiss the amended complaint on the ground that plaintiff had not exhausted his administrative remedy (p. 15). Plaintiff alleged he did exhaust all the remedies available to him under the contract (p. 11). It thus became an issue of mixed law and fact on

that feature of the case which plaintiff says is to be submitted to a jury under proper instructions.

It was in the arguments and briefs opposing the defendant's motion assigning error in the Circuit Court of Madison County, Illinois, that the federal questions were raised, i. e., the right under federal statute to bring the suit and the deprivation of federal constitutional rights if not allowed to maintain the suit. The defendant's motion to dismiss was sustained (p. 18). The federal statute was pleaded in plaintiff's complaint and amended complaint. The federal rights were spelled out again as assignments of error by their violation in the plaintiff's briefs to the Appellate Court of Illinois for the Fourth District. That Court ducked the issues. At first it granted an extension based upon the death of a judge in the third judicial circuit and the death of Mr. Cunningham, a long time deputy clerk to Mr. Kellermann, Circuit Clerk of Madison County, Illinois. The extension was attacked by defendant and defendant's motion to dismiss the appeal was denied. Then the old Illinois "merry-go-around" started up again (332 U. S. 570). The Appellate Court drawing a line of distinction where one never existed before as between transcript of the record and record on appeal and withdrew its extension in its opinion. That Court had its decision in Keel v. Ill. Term. R. Co., 346 Ill. App. 169, 104 N. E. 2d 659, called to its attention, but when you read its two opinions in this case and Keel there is nothing to indicate they are alike.

The plaintiff then petitioned the Illinois Supreme Court for leave to appeal, which was denied. We again assign error and say that plaintiff's rights under federal statute and the Federal Constitution to bring and maintain his action have been violated.

ARGUMENT FOR THE ALLOWANCE OF THE WRIT.

The important and compelling reason for the allowance of the writ is a conflict in the decisions of the United States Supreme Court. When a person is hired by a railroad his rights are governed by a contract entered into under the authority of Federal Law which supercedes State Law. Rwy. Employees Dept., A. F. L., v. Hanson, 351 U. S. 225, 100 L. ed. 1112, 76 S. Ct. 714. If that employee is wrongfully discharged by the railroad, and accepts his discharge as final, his right to sue for damages is governed by state law instead of federal law. T. W. A. v. Koppal, 345 U. S. 653, 97 L. ed. 1325, 73 S. Ct. 906.

The heart of the controversy concerns coexistence or exclusiveness of administrative remedy. In the Koppal case it is clear that the court used the term "administrative remedy" interchangeably with "contractual remedy."

The carmen's agreement, pleaded by plaintiff, is implemented by the Railway Labor Act, Title 45, U. S. C., Sec. 151 et seq., and the contract and statute should be read together. There is no statute, Federal or Illinois, that requires the exhaustion of administrative remedy. There is no statute that requires the exhaustion of contractual remedy. The doctrine exists by reason of the necessity to make a showing of exhaustion of such remedies in order to state a prima facie case for the enforcement of or challenge of an administrative decision. The doctrine first arose where legal proceedings follow after administrative proceedings, and the necessity was one of self protection for the courts. Otherwise, courts would be flooded with such matters before there was a final determination either within a union tribunal or within an administrative tribunal. The doctrine is akin to that which requires that a decision of a lower court be final and conclusive before it is appealable.

The remedies afforded by the Railway Labor Act are coexistent, but separate and distinct. If a railway employee that has been wrongfully discharged wants his job back, his exclusive remedy is to go before the Railroad Adjustment Board. Where such discharged employee accepts his discharge as final if he wants damages he must file his suit in a court of law.

"Where the construction of a written contract depends, not only upon the meaning of the words employed, but also upon extrinsic facts, * * * if the facts are controverted then the question as to what the contract was is a mixed one of law and fact, to be submitted to the jury." Carstens Packing Co. v. Sterne & Son Co., 286 Ill. 355, l. c. 357, 121 N. E. 737, l. c. 739; DuHamel v. Board of Education, 7 Ill. App. 2d 487, 130 N. E. 2d 10.

It is difficult, if not impossible, to determine from the order dismissing the complaint whether the lower court was applying the doctrine of primary exclusive jurisdiction or that of administrative finality. The fact that the order was negative in form made it affirmative in substance. When the lower court ruled upon the motion based upon the decision of the Railroad Adjustment Board, it was disregarding what this court had to say in Rochester Telephone Corp. v. U. S., 307 U. S. 125, 139, 83 L. Ed. 1147, 1157, 59 S. Ct. 754, 761.

The case of Keel v. Ill. Term. R. Co., 346 Ill. App. 169, 104 N. E. 2d 659, was decided by the Appellate Court of Illinois for the Fourth District, and all of its Judges at that time being the same Judges who dismissed the appeal in this case. Their decision was called to their attention in the brief to that court urging that it was not necessary to exhaust administrative remedies in Illinois in order for a wrongfully discharged railroad employee, to bring a suit for damages, where he accepts his discharge as final. It was also called to the attention of the Appellate

Court of Illinois that while the Federal Circuit Court of Appeals for the Seventh Circuit sitting in judgment over an Illinois contract may have gotten off on the wrong foot in Starke v. N. Y. C. & St. L. R. Co., 180 Fed. 2d 569, the same Court changed its position in a later case sitting in judgment on an Illinois contract in Bester v. Chicago, M., St. P. & P. R. Co., 195 Fed. 2d 73. Other decisions of the Federal Seventh Circuit Court of Appeals which support the proposition that it is not necessary to exhaust administrative remedies in order to bring an action for damages under the Railway Labor Act are: U. S. ex rel. DeLucia v. O'Donovan, 178 Fed. 2d 876, certiorari denied 340 U. S. 886, 95 L. ed. 643, 71 S. Ct. 207, and Lyons v. Illinois Greyhound Lines, 192 Fed. 2d 533. All of which was called to the attention of the Illinois Appellate Court.

There is no authority needed to support the statement that it is possible for a legislative act or an executive act to be in such irreconcilable conflict with the Constitution that it must be declared void. Some authorities contend that a decision of a court may not be challenged as being in conflict with the Constitution but it has been ruled long ago that a judicial decision is an action of the State. In City of St. Petersburg v. Alsup, 238 Fed. 2d 830, 832, the court said:

> "A state cannot, by judicial decision or otherwise, remove any of its activities from the inhibitions of the Fourteenth Amendment. See Nixon v. Condon, 286 U. S. 73, 88, 52 S. Ct. 484, 76 L. Ed. 984. * * * In Ex parte Virginia, 100 U. S. 339, 347, 25 L. Ed. 676:
>
> > 'Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is

> clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agent with power to annul or evade it.'
>
> * * *"

Not only did the Circuit Court err in the application of the Federal Law but the Illinois Appellate Court compounded error by dismissing the appeal. The Appellate Court ignored the fact that a ruling upon a motion by a trial judge is just as much a legal proceeding as if evidence had been taken. In the case of Keel v. Ill. Term. R. Co., 346 Ill. App. 169, 104 N. E. 2d 659, the same Appellate Court was passing on the correctness of a decision based upon a motion challenging the right to bring an action based upon a Federal Statute in a State Court.

Certainly it is elementary that due process includes equal protection of the laws and petitioner was not afforded the same treatment that was given to Keel.

Under the Tenth Amendment whatever powers are not delegated to the United States are reserved to the states respectively. The converse is likewise true, otherwise the words "nor prohibited by it to the States" would be meaningless. The Interstate Commerce clause is a power delegated to the United States. If any state has the right to regulate in the field of Interstate Commerce then only confusion can result.

Under the Seventh Amendment the right to a jury trial must be preserved in any court of the United States. If a United States Court has to accord a jury trial in a matter based upon a federal statute where the jurisdiction is by diversity of citizenship; then in a matter brought in a state Court of one of the United States based upon a federal statute the federal decisions ought to control.

Under Article 1, Section 10, the state is prohibited from passing any law impairing the obligation of contracts.

Can the State of Illinois passing a Civil Practice Act or promulgating rules of practice that would accomplish indirectly what it cannot do directly? In one case we believe the Erie doctrine was amplified to say "No." In Guaranty Trust Co. v. York, 326 U. S. 99, 89 L. Ed. 2079, ... S. Ct. ...., the Court said:

* * *

"It is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us. Erie R. Co. v. Tompkins was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding 'substance' and 'procedure,' we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, Cities Serv. Oil Co. v. Dunlap, 308 U. S. 208, 84 L. ed. 196, 60 S. Ct. 201, as to conflict of laws, Klaxon Co. v. Stentor Electric Mfg. Co., 313

U. S. 487, 85 L. ed. 1477, 61 S. Ct. 1020, as to contributory negligence, Palmer v. Hoffman, 318 U. S. 109, 117, 87 L. ed. 645, 651, 63 S. Ct. 477, 144 A. L. R. 719. And see Sampson v. Channell, 110 F. (2d) 754. Erie R. Co. v. Tompkins has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties. * * * "

If the federal courts must apply federal law to the interpretation of federal questions and if state courts must do likewise, then state procedural technicalities ought not be employed by state courts to duck the questions in issue. If the court does go wrong this Court has said it will not refrain from deciding the issue even if the state has not reached a decision on the point. We realize we are urging a landmark decision but one not without good authority to lead the way. In Propper v. Clark, 337 U. S. 472, 93 L. Ed. 1480, . . . S. Ct. . . . , the Court said:

" * * * *

"We have refused in a diversity of citizenship case to allow the difficulty of an issue of state law to deter us from exercising our jurisdiction when federal determination was subject to equitable discretion and the state issue was the only one in the case. Meredith v. Winter Haven, 320 U. S. 228, 88 L. ed. 9, 64 S. Ct. 7. To refrain from deciding it, we there said, would be to enervate diversity jurisdiction.

"Where a case involves a nonconstitutional federal issue, however, the necessity for deciding which depends upon the decision of an underlying issue of state law, the practice in federal courts has been, when necessary, to decide both issues. This was the course we followed in Markham v. Allen, 326 U. S. 490, 495,

406, 90 L. ed. 256, 260, 261, 66 S. Ct. 296, a case arising under the Trading with the Enemy Act, where an issue was the construction of a state statute. The state law question in Estate of Spiegel v. Commissioner, 335 U. S. 701, ante, 330, 69 S. Ct. 301, supra, was concededly difficult and unsettled; its decision admittedly controlled the existence of a federal question, since a finding that there was no possibility of reverter under Illinois law would have finally determined the issue on which the case was decided. And yet, although a method may have existed for obtaining an adjudication on the issue from the Illinois courts, 335 U. S. 632, 673, 674, ante, 288, 313, 314, 69 S. Ct. 322, 337, this Court followed the procedure which we adopt here of depending upon the determination of state law by the Court of Appeals. 335 U. S. 701, 707, 708, ante, 330, 337, 338, 69 S. Ct. 301. In so doing it followed the decision in Helvering v. Stuart, 317 U. S. 154, 161, et seq., 87 L. ed. 154, 159, 63 S. Ct. 140. Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, a common-law case, is itself a precedent against any general ruling that cases properly in the federal courts that depend upon state law should have that issue submitted to state courts for decision. See the later decision in the same case. Tompkins v. Erie R. Co. (C. C. A. 2d N. Y.), 98 F. 2d 49. * * * "

When a railroad employee is wrongfully discharged and his union refuses to prosecute his grievance with the officials of the railroad and the union refuses to prosecute his grievance with the Railroad Adjustment Board; then, so long as the Railroad Adjustment Board takes the attitude of discouraging an individual from prosecuting his own grievance, the door of the courts should be open to allow a suit for damages when the employee accepts his wrongful discharge as final. There is no better way of encouraging the Railroad Adjustment Board to take jurisdiction in

such cases or to discourage the railroads from wrongful action than to leave access to the courts open for a jury trial.

If there be no access to court for damages by a wrongfully discharged railroad employee because of state statute or decision having the force of law; where that same employee is forced under his contract to join a union under a contract between a craft and a carrier having sanction of federal law there is a lack of due process and unequal treatment.

Congress has not seen fit to withdraw from the wrongfully discharged employee the right to go into Court for damages. We fail to see where a state by act or decision has the right to make such withdrawal.

We have reached an age where a man has been able to break the sound barrier by travelling at speeds far in excess of those travelled by sound waves. While such was not anticipated when the last two cases cited were decided, they open the door of opportunity for this Court in this case to re-examine the Interstate Commerce clause. We urge that a re-examination of that clause is vital to our present day progress and that this case furnishes the ideal state of facts by which this Court may decide not to allow a drift too far down the Erie road (Erie v. Tompkins), especially in state decisions concerning Federal rights.

Respectfully submitted,

ZENO MIDDLETON,
Attorney for Petitioner.

APPENDIX.

1. Constitutional provisions involved in this case.

2. Excerpt from Transcontinental & Western Air, Inc., v. Koppal, 345 U. S. 653, 97 L. ed. 1325, 73 S. Ct. 906.

3. Excerpt from Rwy. Employees Dept. A. F. L. v. Hanson, 351 U. S. 225, 100 L. ed. 1112, 76 S. Ct 714.

CONSTITUTION OF THE UNITED STATES.

XIV. Amendment.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

X. Amendment.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

VII. Amendment.

In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

CONSTITUTION OF ILLINOIS.

ARTICLE III.

Distribution of Powers.

Departments of government

The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

ARTICLE II.

Bill of Rights.

§ 2. Due process

No person shall be deprived of life, liberty or property, without due process of law.

§ 5. Trial by jury

The right of trial by jury as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace, by a jury of less than twelve men, may be authorized by law.

CONSTITUTION OF THE UNITED STATES.

ARTICLE I.

"§ 10. No state shall * * *; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts; * * *."

Transcontinental & Western Air, Inc., v. Koppal, 345 U. S. 653, 97 L. ed. 1325, 73 S. Ct. 906.

"* * * On the other hand, if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so. Here respondent was employed by a carrier, subject to Title II of the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with that Act. Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do and his complaint was properly dismissed. * * *."

Railway Employes' Dept., A. F. L., v. Hanson, 351 U. S. 225, 100 L. ed. 1112, 76 S. Ct. 714.

"* * * If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. Cf. Smith v. Allwright, 321 U. S. 649, 663, 88 L. ed. 987, 996, 64 S. Ct. 757, 151 A. L. R. 1110. In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. Cf. Steele v. Louisville & N. R. Co., 323 U. S. 192, 198, 199, 204, 89 L. ed. 173, 180, 181, 184, 65 S. Ct. 226; Public Utilities Com. v. Pollak, 343 U. S. 451, 462, 96 L. ed. 1068, 1077, 72 S. Ct. 813. * * *."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. ~~1069.~~ 174

ALBERT R. COSGROVE,
Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation;
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION.

HENRY DRIEMEYER,
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Attorneys for Respondent.

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Petitioner states that jurisdiction is invoked under Section 1257 (3) of Title 28 United States Code. Jurisdiction, however, does not exist.

Petitioner's prayer is for a writ of certiorari to the Supreme Court of Illinois. That court simply denied a petition for leave to appeal from the judgment of the Appellate Court of Illinois for the Fourth District. The Appellate Court was the highest court of Illinois in which

a decision could be had on the merits of petitioner's claim. The Appellate Court dismissed an appeal by petitioner from an adverse judgment of the Circuit Court of Madison County, Illinois, for the reason that the record on appeal to the Appellate Court from the Circuit Court was not filed within the time required by Illinois Supreme Court Rule 36, 7 Ill. (2nd), 57, 58, and by Rule 1 of the Uniform Illinois Appellate Court Rules, 7 Ill. App. (2nd), VIII. The provisions of the rules of the Supreme Court of Illinois and of the Appellate Court made such dismissal mandatory.

The decision of the Illinois Appellate Court rested entirely upon a question of Illinois procedural law. This court does not have jurisdiction to review decisions of State courts which rest upon adequate non-federal grounds and, particularly, upon State laws and practice relative to jurisdiction of Appellate Courts and the mode and time of invoking that jurisdiction. This court in **John v. Paullin**, 231 U. S. 583, 585, 58 L. Ed. 381, 382, citing many previous decisions said:

> "As the supreme court of the state did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the state, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. * * * Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.
>
> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, and the

state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

See also **McCoy v. Shaw**, 277 U. S. 302, 72 L. Ed. 891; **Matheson v. Bank of Alabama**, 7 Howard 260, 12 L. Ed. 692; **Newman v. Gates**, 204 U. S. 89, 51 L. Ed. 385; **Chesapeake & Ohio Ry Co. v. McDonald**, 214 U. S. 191, 53 L. Ed. 963; **Central Union Telephone Co. v. City of Edwardsville**, 269 U. S. 190, 70 L. Ed. 229.

It is, therefore, respectfully submitted that petitioner's application for a writ of certiorari should be denied.

Respectfully submitted,

HENRY DRIEMEYER,
ROBERT L. BRODERICK,
Attorneys for Respondent.